UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

IN THE MATTER OF:	:	**CASE NUMBERS**
JOHN SCOTT FRIZZELL, JR. RHONDA WYATT-FRIZZELL,	:	BANKRUPTCY CASE NO. 05-13880-WHD
Debtors.	:	
FIRST NATIONAL BANK OF GRIFFIN,	:	
Plaintiff,	:	ADVERSARY PROCEEDING NO. 06-1019
v.	:	
RHONDA WYATT-FRIZZELL,	:	
	:	IN PROCEEDINGS UNDER CHAPTER 7 OF THE
Defendant.	:	BANKRUPTCY CODE

ORDER

Before the Court is the Motion for Summary Judgment, filed by First National Bank of Griffin (hereinafter the "Plaintiff") against Rhonda Wyatt Frizzell (hereinafter the "Debtor"). The Motion is unopposed. This matter arises from a complaint objecting to the dischargeability of a particular debt and, accordingly, constitutes a core proceeding, over which this Court has subject matter jurisdiction. *See* 28 U.S.C. § 157(b)(2)(I).

FINDINGS OF FACT

As required by Bankruptcy Local Rule 7056-1(a)(2), the Plaintiff has attached to its

Motion a "separate and concise statement of the material facts, numbered separately, as to which the movant contends no genuine issue exists to be tried." BLR 7056-1(a)(2). Under the local rule, the respondent is required to "attach to the response a separate and concise statement of material facts, numbered separately, as to which the respondent contends a genuine issue exists to be tried" and "response should be made to each of the movant's numbered material facts." BLR 7056-1(a)(2). If the respondent fails to do so, "[a]ll material facts contained in the moving party's statement that are not specifically controverted in respondent's statement shall be deemed admitted." *Id.* The Debtor has not responded. Accordingly, the Court shall deem the Plaintiff's statement of material facts to be admitted. In making its finding of facts, the Court, in accordance with the local rule, has not considered any statements of issues or conclusions of law made by the Plaintiff. *See* BLR 7056-1(a)(2).

Additionally, the Plaintiff has served upon the Debtor requests for admissions, to which the Debtor has failed to respond within the time provided by Rule 36(a) of the Federal Rules of Civil Procedure. Consequently, the facts stated in the Plaintiff's First Request for Admissions are deemed admitted.

In accordance with the above, the Court makes the following findings of fact:

1. On July 28, 2005, the Plaintiff loaned the Debtor $12,128.35 at 10.016% interest. The debt was secured by 2001 Saturn automobile and a 1998 Acura automobile (hereinafter the "Collateral"). Plaintiff's Statement of Material Facts, ¶ 1.

2. The Debtor filed a voluntary bankruptcy petition under Chapter 7 of the Code on October

12, 2005. At that time, the balance of the debt was $12,535.93. Plaintiff's Statement of Material Facts, ¶ 2.

3. The Debtor knowingly sold or otherwise transferred the Collateral without the Plaintiff's knowledge or permission. Plaintiff's Statement of Material Facts, ¶ 3; Plaintiff's First Request for Admissions, ¶ 22.

4. For the twelve months preceding the filing of the Debtor's bankruptcy petition, including the date upon which she borrowed money from the Plaintiff, her monthly income was $3,440.55, and her monthly expenses totaled $5,273. Plaintiff's First Request for Admissions, ¶ 4; ¶ 11.

5. At the time the Debtor borrowed the money from the Plaintiff, she did not have the ability to make the payments in accordance with the terms of the agreement. Plaintiff's First Request for Admissions, ¶ 5.

6. At the time the Debtor borrowed the money from the Plaintiff, she did not intend to make the payments. Plaintiff's First Request for Admissions, ¶ 10.

7. At the time the Debtor borrowed the money from the Plaintiff, she was incurring debt, including cash advances on credit cards, in order to pay regular monthly expenses. Plaintiff's First Request for Admissions, ¶ 12.

8. Prior to borrowing the money from the Plaintiff, the Debtor had contemplated filing bankruptcy and had consulted an attorney about filing a bankruptcy petition. Plaintiff's First Request for Admissions, ¶¶ 18-19.

CONCLUSIONS OF LAW

The Plaintiff's complaint seeks a judgment against the Defendant in the amount of $12,535.93 plus interest and costs and a declaration that this debt is nondischargeable pursuant to section 523(a)(2)(A) and (a)(6) of the Bankruptcy Code. Plaintiff is seeking summary judgment as to both claims. The Debtor has not responded to the Motion and, accordingly, pursuant to Bankruptcy Local Rule 7007-1(c), the Motion is deemed unopposed.

A. *Summary Judgment Standard*

In accordance with Rule 56 of the Federal Rules of Civil Procedure, made applicable to adversary proceedings by Rule 7056 of the Federal Rules of Bankruptcy Procedure, a party moving for summary judgment is entitled to prevail only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322. The moving party bears the initial burden of establishing that no genuine factual issue exists. *See Celotex*, 477 U.S. at 323; *Clark v. Coats & Clark, Inc.,* 929 F.2d 604 (11th Cir.1991). The movant must point to the pleadings, discovery responses or supporting affidavits which tend to show the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323.

The Court must construe this evidence in the light most favorable to the non-moving

party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *Rollins v. TechSouth, Inc.*, 833 F.2d 1525 (11th Cir.1987). If the moving party satisfies its burden to show an absence of a genuine issues of material fact, no burden of going forward arises for the opposing party, and the non-moving party must designate "specific facts showing that there is a genuine issue for trial." *Clark,* 929 F.2d at 608; *Celotex,* 477 U.S. at 324.

B. *Section 523(a)(2)(A)*

The bankruptcy process serves, through its discharge provisions, as a means by which individuals may escape from overburdensome debt. *Grogan v. Garner*, 498 U.S. 279, 286 (1991)(citations omitted). At the same time, however, a separate equitable policy requires that only honest debtors be entitled to an unencumbered "fresh start." *Id.* at 286-87. Thus, as an exception to its general discharge provisions, the Bankruptcy Code provides that a "discharge under § 722 . . . of this title does not discharge an individual debtor of any debt . . . for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by . . . false pretenses, a false representation, or actual fraud." 11 U.S.C. § 523(a)(2)(A). Consequently, through section 523(a)(2)(A), the Code denies those individuals who do not qualify as "honest but unfortunate debtors" the benefits of a fresh start. *Grogan*, 498 U.S. at 287. Like other exceptions to discharge, however, the provisions of section 523(a)(2)(A) must be narrowly construed in favor of the debtor. *Gleason v. Thaw*, 236 U.S. 558, 562 (1915); *Schweig v. Hunter (In re Hunter)*, 780 F.2d 1577, 1579 (11th Cir.

1986).

The creditor bears the burden of establishing non-dischargeability under section 523(a)(2)(A). *Hunter*, 780 F.2d at 1579. Specifically, the creditor must establish by a preponderance of the evidence that:

> (1) the debtor made a false representation with the purpose and intention of deceiving the creditor;
> (2) the creditor relied upon the debtor's representation;
> (3) such reliance by the creditor was justified;
> (4) the creditor suffered a loss as a result of that reliance.

Moore v. Gill (In re Gill), 181 B.R. 666, 673 (Bankr. N.D. Ga. 1995). Additionally, the creditor may prove that the debtor incurred the debt through "actual fraud" by establishing that debtor incurred the debt "without the actual, subjective intent to pay the debt thereby incurred." *FDS National Bank v. Mahabub Alam (In re Alam)*, No. 03-6465-PWB (Bankr. N.D. Ga. June 24, 2004) (Bonapfel, J.) (citing *McClellan v. Cantrell*, 217 F.3d 890, 893 (7th Cir. 2000)) (actual fraud can consist of "all surprise, trick, cunning, dissembling, and any unfair way by which another is cheated").

As it is not likely that a debtor would admit that he or she incurred debt without the intent to pay it, it is appropriate for the Court to infer this intent from the facts of the case. *Id.* at 1145 ("Because fraud lurks in the shadows, it must usually be brought to light by consideration of circumstantial evidence."). The Court can infer from the totality of the circumstances whether the debtor lacked the subjective intent to repay the debt at the time it was incurred. *Citibank v. Dougherty (In re Dougherty)* 84 B.R. 653, 657 (9th Cir. BAP

1996) (inferring from the totality of the circumstances whether the debtor made a fraudulent misrepresentation to the creditor of intent to repay); *see also In re Carpenter*, 53 B.R. 724 (Bankr. N.D. Ga. 1985).

Appropriate factors to consider when determining whether the debtor had the subjective intent to repay a debt include: 1) the length of the time between the incurring of the debt and the filing of bankruptcy; 2) whether or not the debtor consulted an attorney concerning the filing of bankruptcy before incurring the debt; 3) the number of transactions; 4) the amount of the debt; 5) the financial condition of the debtor at the time the debt was incurred; 6) whether or not the debtor was employed; 7) the debtor's prospect for employment; 8) the financial sophistication of the debtor; 9) whether the debt was incurred for luxuries or necessities. *See, e.g., In re Ettell*, 188 F.3d 1141 (9th Cir. 1999) (citing *In re Eashai*, 87 F.3d 1082 (9th Cir. 1996)).

In this case, the Plaintiff has established that, at the time the Debtor incurred the charges at issue, she lacked the financial ability to pay her monthly expenses, let alone the payments on a new loan. Additionally, the Debtor's Statement of Financial Affairs and Schedules indicate that the Debtor's husband was unemployed at the time the petition was filed and had earned only $3,000 in 2005 and had earned no income in 2004. Accordingly, it appears that the Debtor and her husband had been in a dire financial situation and unable to meet their monthly obligations for quite some time. The facts of the case further reflect that the Debtor borrowed money from the Plaintiff just two and a half months prior to filing her bankruptcy petition and that she consulted an attorney regarding the filing of the petition

prior to borrowing money from the Plaintiff.

The Plaintiff argues that the Debtor's clear inability to even pay the minimum amounts due on her debts, as well as the timing of the transaction, supports the inference that the Debtor had no intent to pay the payments on the loan at the time she incurred it. Although the Court is hesitant to find that a debtor has committed fraud based upon this quantum of evidence, it appears that the Debtor has no interest in disputing the Plaintiff's contentions and has submitted no evidence to counter the Plaintiff's argument that these facts support a finding of fraud. Accordingly, the Court will draw from these facts an inference that, at the time the Debtor borrowed $12,128.35 from the Plaintiff, she lacked the subjective intent to repay the loan.

C. *Section 523(a)(6)*

The Plaintiff also alleges that the Debtor converted the Collateral, which constitutes a tort under Georgia law, and should be the basis of a finding that the debt is nondischargeable under section 523(a)(6). Section 523(a)(6) provides that any debt for willful and malicious injury by the debtor shall be nondischargeable. 11 U.S.C. § 523(a)(6). Such an injury can include an injury to a property interest held by another. *See Davis v. Aetna Acceptance Co.*, 293 U.S. 328 (1934); *In re Wolfson*, 56 F.3d 52 (11th Cir. 1995); *In re Foust,* 52 F.3d 766 (8th Cir. 1995) (knowing and fraudulent conversion of proceeds of creditor's collateral resulted in nondischargeable debt under section 523(a)(6)); *In re Pharr*

Luke, 259 B.R. 426 (Bankr. S.D. Ga. 2000); *In re LaGrone*, 230 B.R. 900 (Bankr. S.D. Ga. 1999) (the act of conversion of property is an intentional injury contemplated by the exception to discharge). The plaintiff bears the burden of establishing nondischargeability under section 523(a)(6). *Schweig v. Hunter (In re Hunter)*, 780 F.2d 1577, 1579 (11th Cir. 1986).

To establish that a debt is one that arises from a willful injury, a plaintiff must show that the debtor had the specific intent to inflict the injury or that there was a substantial certainty that injury would result from the debtor's actions. *See In re Miller*, 156 F.3d 598 (5th Cir. 1998); *In re Moody*, 277 B.R. 865 (Bankr. S.D. Ga. 2001); *see also In re Hollowell*, 242 B.R. 541 (Bankr. N.D. Ga. 1999) (Murphy, J.). This standard is consistent with the United States Supreme Court's holding that the fact that the debtor's actions were voluntary is insufficient to support a conclusion that the debt is nondischargeable. *See Kawaauhau v. Geiger*, 523 U.S. 57 (1998) ("The word 'willful' . . . modifies the word 'injury,' indicating that nondischargeability takes a deliberate or intentional *injury,* not merely a deliberate or intentional *act* that leads to injury."). "Malicious means wrongful and without just cause or excessive even in the absence of personal hatred, spite, or ill will." *In re Neal*, 300 B.R. 86, 93-94 (M.D. Ga. 2003) (citing *In re Walker*, 48 F.3d 1161 (11th Cir. 1995)).

"[A] willful and malicious injury does not follow as of course from every act of conversion, without reference to the circumstances." *Davis*, 293 U.S. at 332; *see also In re Wolfson*, 56 F.3d 52 (11th Cir. 1995). As the United States Supreme Court has stated,

"[t]here may be a conversion which is innocent or technical, an unauthorized assumption of dominion without willfulness or malice." *Davis*, 293 U.S. at 332.

In this case, the Plaintiff has established that the Debtor knowingly sold or otherwise disposed of the Collateral without the Plaintiff's knowledge or permission. The Debtor has presented no evidence or argument that would enable the Court to find that the Debtor did not voluntarily sell the Collateral with the knowledge that doing so would harm the Plaintiff's ability to collect its debt. Accordingly, the Court must find that no question of fact remains and that, as a matter of law, the Plaintiff is entitled to a finding that the debt is also nondischargeable pursuant to section 523(a)(6).

CONCLUSION

For the reasons stated above, the Court finds that the Plaintiff's Motion for Summary Judgment should be and, hereby is, **GRANTED**. The Plaintiff is entitled to a judgment in the amount of $12,535.93, together with pre and post-judgment interest and costs. The amount of the judgment is nondischargeable pursuant to section 523(a)(2)(A) and 523(a)(6).

IT IS SO ORDERED.

At Newnan, Georgia, this 8 day of August, 2006.

W. HOMER DRAKE, JR.
UNITED STATES BANKRUPTCY JUDGE